

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Appli 53 of 2006

PETER MWARO VIDZO.....APPLICANT

VERSUS

BRENDA NDUKU MUTISYA.....RESPONDENT

RULING

This is an application brought under Order 41 Rule 4 of the Civil Procedure Rules for Stay of execution of the order of the Children's Court issued on 23rd December 2005 in Children's Court Case Number 290 of 2005 pending the hearing and final determination of Civil Appeal number 8 of 2006 which the Applicant has preferred against that order. The Application is based on the ground that if stay is not granted the appeal will be rendered nugatory this causing the Applicant to suffer irreparable loss. The Order appealed against directed that in addition to school fees and medical expenses the Applicant should pay to the Respondent a sum of Sh.6000/= monthly to take care of the Child's other expenses.

Mrs. Kipsang, Counsel for the Applicant submitted that the appeal has overwhelming chances of appeal as the Children's Court did not take into account the Applicant's earning capacity.

Mr. Mabeya, Counsel for the Respondent, on the other hand urged me to discuss this application as the Children's Court Order is balanced. He said that the Respondent earns only Sh.10,000/= against monthly expenses of more than Ksh.14500/=.

Both Counsel have not addressed me on the points that should be considered in an application like this. Instead they attempted to argue the merits and demerits of the appeal itself.

Whereas the Applicant in an application like this should show that his appeal is not frivolous the cardinal point he should satisfy the court on is that if stay is not ordered he will suffer substantial loss. That he has not done. Other than his Counsel's word of mouth from the bar that he earns Sh.40,000/= per month, he did not exhibit any document to prove that.

That notwithstanding, however, I have to consider the Respondent's case as parental responsibility has to be shared. She said in her replying affidavit her rent and other expenses amount to Sh.6500/= and not Sh.14500/= as claimed by her lawyer.

Taking all these factors into account and considering the fact that the Applicant is paying the child's fees and medical expenses in full I allow this application on condition that pending the hearing and final determination of the appeal the Applicant shall pay to the

Respondent Sh.4000/= per month as maintenance for the child. Each party shall bear its own costs.

DATED AND DELIVERED THIS 24TH DAY OF NOVEMBER 2006.

D.K. MARAGA

JUDGE

24.11.2006